



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 588” B” OF 2013

(Formerly Eldoret Hccc No. 7 of 2010)

SEKO LIMITED..... PLAINTIFF

VERSUS

SELINA C. KANDA.....1ST DEFENDANT

JAIDEEP SATISCHANDRASHAH.....2ND DEFENDANT

AYUB AHMED MUSA.....3RD DEFENDANT

COMMISSIONER OF LANDS.....4TH DEFENDANT

CHIEF LAND REGISTRAR.....5TH DEFENDANT

UASIN GISHU DISTRICT LAND REGISTRAR.....6TH DEFENDANT

THE ATTORNEY GENERAL.....7TH DEFENDANT

JUDGMENT

Seko Limited (hereinafter referred to as the plaintiff) has come to court by way of plaint amended on 13.6.2013 vide a court order issued on 12.6.2013. It is averred that on or about 30th September, 1997, the plaintiff purchased the whole of that parcel of land known as Eldoret Municipality Block 13/173 which is situated within the Elgon View Estate in Eldoret Municipality from one Harbhajan Singh Sembi and Manjeet Singh Sembi at an agreed consideration of Kshs.2,850,000.00. That prior to entering into the agreement of sale, the plaintiff through the firm of Advocates who were acting for it in the transaction applied for and obtained a certificate of official search showing that the Vendors were the registered owners of the suit land on the date of the purchase. That according to the certificate of official search and the certificate of title, the original and a copy of which were supplied to the plaintiff prior and after entering into the agreement of sale, the Vendors’ names were entered into the register as the owners of the suit parcel of land on 25.1.1991. That based on the above facts and the undisputed position that the Vendors were the registered owners of the suit parcel of land, the plaintiff paid the entire purchase price for the land and applied for a transfer of the land into its name. The transfer was presented and accepted by the Uasin Gishu District Land Registrar who entered the plaintiff’s name as the registered owner of land parcel number Eldoret Municipality Block 13/173 on 11.11.1997. A certificate of lease evidencing this fact was issued to the plaintiff on the same day.

The plaintiff immediately took possession of its land and subsequently fenced it off as an indication that the land was alienated and has been in possession of the suit parcel of land since 1997 and that such possession still subsists to-date. The plaintiff is and has also been in possession of the original certificate of lease over its land since 1997 and that such possession subsists to-date. The plaintiff was in peaceful, uninterrupted occupation of its land from 1997 until January 2010, when the plaintiff through its employees received information that persons who were initially unknown to the plaintiff were marketing and offering the plaintiff's land for sale. The plaintiff through its employees also started noticing unusual visits by strangers ostensibly to inspect its land. The plaintiff by itself, its employees, servants, agents and through its advocates carried out extensive inquiries to determine how and under what circumstances third parties were laying claim and inspecting its land.

The plaintiff established from the inquiries that the 1st defendant was the party laying claim and offering the plaintiff's land for sale. Moreover, that the 1st defendant had in her possession a document purporting to be a certificate of lease over the plaintiff's land and purportedly issued by the Uasin Gishu District Land Registrar and that the 1st defendant had purportedly sold the plaintiff's land to the 2nd and 3rd defendants on the basis of the forged and fraudulent certificate of lease. According to the plaintiff, the 2nd and 3rd defendants were holding a document purporting to be a certificate of lease over the plaintiff's parcel of land and purportedly issued by the Uasin Gishu District Land Registrar and that the 1st defendant had caused her name to be entered in the computer maintained by the Municipal Council of Eldoret and bearing the names and the particulars of rate payers.

In view of the above circumstances, the plaintiff applied for an official search from the Uasin Gishu District Land Registrar's office. The certificate of official search issued on 14th January, 2010 shows that the plaintiff is still the registered owner of the suit land and that there are no documents held at the registry evidencing that the defendants in fact own or have ever been registered as the owners of the suit land. The plaintiff had not sold, leased and or otherwise transferred its interest over the suit land to the defendants and has in fact never dealt with any of them. The plaintiff shall therefore contend that the defendants' actions are fraudulent, unlawful, illegal, null and void and amount to an interference with the plaintiff's rights of ownership of the suit land as more particularly set out below.

The plaintiff has particularized fraud and illegality on the part of the 1st, 2nd and 3rd defendants as follows: -

- (i) Forging and uttering false documents over the plaintiff's land.***
- (ii) Obtaining and holding onto false documents without the plaintiff's consent and authority.***
- (iii) Purporting to acquire documents over the plaintiff's land without the benefit of a sale, transfer or any other instrument executed in their favour by the plaintiff.***
- (iv) The plaintiff's land is alienated and therefore private land. Neither the Government nor any other authority can allocate it to any party.***
- (v) Trespassing into the plaintiff's land without its permission, consent and or authority.***
- (vi) Interfering with records relating to the plaintiff's land held at the Municipal Council of Eldoret.***
- (vii) Forging certificates of lease with the intention of defrauding third parties.***
- (viii) Holding onto documents that are not borne out by the Registry and other official documents held at the Lands Office.***
- (ix) Forging signatures and purporting them to be those of government officers.***

The plaintiff contends that the purported certificates of lease issued to the 1st, 2nd and 3rd defendants by the 4th, 5th and 6th defendants in their capacity as Government officers are invalid, null and void ab-initio and that the actions of the 4th, 5th and 6th defendants or its officers in sanctioning transactions between the 1st, 2nd and 3rd defendants and other parties and purportedly issuing certificates of lease are unlawful, illegal, null and void ab-initio. The plaintiff has particularized illegality on the part of the 4th, 5th and 6th defendants as follows: -

(i) Accepting for registration forged documents from the 1st, 2nd and 3rd defendants.

(ii) Purporting to issue certificates of lease to the 1st, 2nd and 3rd defendants whereas the plaintiff had a valid certificate of lease.

(iii) Sanctioning transactions relating to the suit land without proper verification of documents held by the 1st, 2nd and 3rd defendants.

(iv) Allowing the falsification of records maintained by its officers in order to defeat the title of the plaintiff over the suit land.

(v) Purporting to sanction the issuance of certificates of lease to the 1st, 2nd and 3rd defendants without the proper consents required for such transactions by the Government of Kenya.

The plaintiff states that it has not surrendered its land to the government and its land has never been the subject matter of any compulsory acquisition proceedings under the provisions of the Land Acquisition Act and contends that the legal interest conferred upon it by the certificate of lease is for a period of 99 years commencing from 1st February, 1999. The plaintiff's lease is alive continuing and shall determine in 2089 subject to the provisions of law relating to extension of leases. The suit land is therefore alienated private land and is not and cannot be available for alienation to the third parties including the defendants 1st, 2nd and 3rd defendants under the provisions of the government Lands Act or any other law.

The plaintiff's claim against the defendants jointly and severally is therefore for a declaration that the plaintiff is the owner of the whole of that parcel of land known as Eldoret Municipality Block 13/173 and that any and all documents held by the 1st, 2nd and 3rd defendants relating to the said parcel of land are fraudulent, illegal, null and void and of no legal consequence.

The plaintiff's further claim against the defendants jointly and severally is for an order directing the 1st, 2nd and 3rd defendants to immediately surrender and hand over to the plaintiff, the court or the Uasin Gishu Land Registrar 6th defendant all the documents held by them over and relating to land parcel Number Eldoret Municipality Block 13/173 and that the said documents be destroyed forthwith.

The plaintiff further prays for an order of rectification of the register maintained by the 6th defendant to reflect the plaintiff as the only registered owner of all that parcel of land known as Eldoret Municipality Block 13/173 and a permanent injunction restraining the defendants, their servants and or agents from entering into, occupying, selling, transferring, encumbering, wasting and or otherwise interfering with the plaintiff's quiet possession use and enjoyment of land parcel number Eldoret Municipality Block 13/173. Last but not least the plaintiff prays for costs of this suit.

1ST DEFENDANT'S CASE

The 1st defendant filed amended defence and counterclaim stating that she holds a valid title to the property being Eldoret/Municipality/Block 13/173. She avers that on or about 28th August, 1989, the 1st defendant purchased the suit property from the then registered proprietors Simon Kiplagat Rono, Luka Kimutai Chebet and Earnest Kiprotich Kimitei at an agreed consideration of Kshs.550,000. That she duly registered her interest in the property and obtained certificate of lease to the same on the 25th January,

1991 and the same is reflected at the central land registry in Nairobi to-date and that she has been in possession of the suit property since 1991 and has been farming on it and rearing cows thereat since 1991 to 2009 when she disposed off the interest of the said property.

The 1st defendant avers that she has been in possession of the suit property since 1991 and has been farming on it and rearing cows thereat since 1991 to 2009 when the 1st defendant entered into an agreement with 2nd and 3rd defendants for purposes of securing a loan which agreement was rescinded and/or frustrated by failure of the said 2nd and 3rd defendants not honoring part of the purchase price. The 1st defendant avers that since she has had uninterrupted use and possession of the property for a period of 18 years until the year 2010 when the plaintiff's agents, directors or servants invoked the police to forcefully eject the 1st defendant out of the suit land. The 1st defendant further avers that searches carried out in June 2009, just before disposal of the property confirmed that the 1st defendant was the then registered owner of the property save to say that the records at the central registry still reflects he is the registered owner.

She denies each and every allegation of fraud and illegality pleaded amended plaintiff and further contends that the plaintiff was unable to prove the allegation of forgery in a criminal case being Eldoret Criminal Case No. 6002/2010 Republic Vs Selina Kanda and states that if there was any fraud, then the same was solely perpetuated by the plaintiff through its agents and/or directors.

In the counterclaim, the 1st defendant claims against the plaintiff that Land Parcel known as Eldoret Municipality/Block 13/173 on the basis of purchase from the original registered proprietors Simon Kiplagat Rono, Luka Kimutai Chebet and Ernest Kiprotich Kimiti. That on or about 28th August, 1989, the 1st defendant purchased the suit land from the foresaid proprietors at an agreed purchase price of Kshs.550,000. That prior to entering into the agreement of sale, the 1st defendant obtained a certificate of lease on the 25th January, 1991. The 1st defendant immediately took possession of her suit land and subsequently fenced it off as an indication that the land was alienated to her and has been in possession of the suit parcel of land since 1991 and that such possession still subsists to date. The 1st defendant avers that she has been paying the outstanding land rates to the then Eldoret Municipal Council. The 1st defendant further contends that on/or about June, 2009 the 2nd and 3rd defendants approached her with an intention to purchase the Parcel of land which transaction was frustrated by non-payment of the She contends that the plaintiff's actions of registering the suit parcel of land into their name is tainted with illegality, fraudulent and irregularity. The 1st defendant has particularized fraud and illegalities on the part of the plaintiff as follows: -

- (a) Obtaining and holding unto false documents.***
- (b) Falsely claiming to be the registered owners of the parcel of land.***
- (c) Failing to disclose how they acquired ownership from the original allottees.***
- (d) Failing to follow the due process in registering the suit title in their name.***
- (e) Falsely effecting transfer from deceased persons.***
- (f) Colluding with the 4th, 5th and 6th defendants in effecting transfer in their favour.***
- (g) Invoking the police officers to prefer flimsy charges of forgery.***

The 1st defendant's claim against the plaintiff is therefore for a declaration that the 1st defendant is the owner of that parcel of land known as Eldoret Municipality Block 13/173 and that any and all documents held by themselves relating to the said parcel of land are fraudulent, illegal, null and void and of no legal consequence. That the 1st defendant also prays for an order compelling the plaintiff to move and leave

vacant possession of the suit land namely Eldoret Municipality Block 13/173.

The 4th, 5th and 6th and 7th defendants filed a statement of defence stating that the first registered owners of the suit land are Simon Kiplagat, Rono, Luka Kimutai, Chebet and Ernest Kiprotich Kimutei on 17.1.1999. The 4th, 5th, 6th and 7th defendants contend that there is no nexus between the original owners and the aforesaid Harbhajan Singh Sembi and Sanjeet Singh Sembi as there are no transfer documents to reflect the necessary transfers from the original registered owners. The 4th – 7th defendants aver that the records reflect the 1st defendant as the current registered owner. The 7th defendant further states that the plaintiff was registered through misrepresentation and without knowledge of the aforesaid defendants.

The plaintiffs in reply to the 4th-7th defendants' defence states that the 4th, 5th, 6th and the 7th defendants are not competent to speak for and on behalf of Simon Kiplagat Rono, Luka Kimutai Chebet, Ernest Kiprotich Kimitei, Harbhajan Singh Sembi and Manjeet Singh Sembi. The plaintiff reiterates that he acquired the suit land for valuable consideration and the said defendants are invited to strict proof of the contrary. The plaintiff reiterates that it is and has always been the registered owner of the suit land and that any and all the documents held by the 1st defendant over the suit land are forgeries and ought to be expunged from the records. In reply, to the 1st defendant's statement of defence to plaintiff denies that the 1st defendant ever purchased any land from Simon Kiplagat Rono, Luka Kimutai Chebet and or Ernest Kiprotich Kimitei and avers that if the 1st defendant is in possession of any agreement from the alleged people, then the alleged agreement is a forgery meant to further the 1st defendant's fraudulent acts of forgery.

The plaintiff reiterates that he has and is still in possession of the suit property which is a residential parcel of land located within Eldoret Municipality. The allegation that the 1st defendant took possession of the land in 1991 and that she has been doing farming and or rearing cows on the land are therefore false and denies that the 1st defendant has been in possession of the suit land for a period of eighteen (18) years or for any other greater or shorter period as alleged.

That the plaintiff avers that Criminal Case No. 6002 of 2010, Republic Vs Selina Kanda never proceeded for hearing for reasons which the plaintiff has never understood the 1st defendant is and has been engaged in numerous acts of fraud and illegality affecting several parcels of land within and outside Eldoret Town.

In the opening statement by **Mr. Chacha Odera**, the learned counsel for the plaintiff he states that the suit was commenced on 20.1.2010 when the plaintiff filed a plaint concurrent to a certificate of urgency and chamber summons seeking various reliefs. The dispute revolves on ownership of Eldoret Block 13/173. At the time the suit was filed, the plaintiff held title to the property and still holds title. The 2nd and 3rd defendant claimed title in view of documents that they held. The 1st defendant upon service and under oath had denied that she sold the property to the 2nd and 3rd defendants. The question is who is holding genuine documents. In a subsequent consent, the 2nd and 3rd defendants concealed to the plaintiff's claim. There is a counterclaim filed by the 1st defendant claiming ownership.

PLAINTIFF'S EVIDENCE AND SUBMISSIONS.

PW1, Micha Cheserem states that he is one of the directors of the Plaintiff Company and he has been duly authorized by the plaintiff to make this statement on its behalf. That he is familiar with the material matters concerning the facts giving rise to this suit and in the circumstances, he is competent to make this statement. That he has been shown by the plaintiff's Advocates on record, the pleadings filed in these proceedings and states that on or about 30th September 1997, the plaintiff purchased the whole of the parcel of land known as Eldoret Municipality Block 13/173 measuring about 0.9309 hectares (hereinafter referred to as the suit property) from Harbhajan Singh Sembi and Manjeet Singh Sembi for a consideration of shs.2,850,000/=. That prior to entering into the agreement for the sale and purchase of the suit property, he visited the suit property with a view of establishing its status and physical condition. The said land was undeveloped and unoccupied. That to establish its registration status, he caused a

search to be done on the title to the said property at the Uasin Gishu District Lands Office. The search was conducted on 3rd September 1997 at the Uasin Gishu Lands Registry and the results of the search established that the suit property was as at that date owned by Harbhajan Singh Sehmi and Manjeet Singh Sehmi. The said Harbhajan Singh Sembi and Manjeet Singh Sembi further furnished the plaintiff with the original certificate of lease in respect of the suit property. That from the record captured in the said certificate of lease and the certificate of official search in respect of the suit property, it is evident that the suit property was as at 25th January, 1991 owned by the said vendors.

That consequent upon the execution of the sale agreement between Harbhajan Singh Sehmi and Manjeet Singh Sehmi of the one part and the plaintiff of the other part, the plaintiff paid the purchase price whereupon the suit property was transferred to it thereby having the plaintiff becoming the registered owner of the suit property. That from the certificate of title and from the records held at the Uasin Gishu Lands Registry, the plaintiff's name was entered into the register as absolute owner of the suit property on 11th November, 1997. That the plaintiff has in its possession and continues to hold the original certificate of lease over the suit property. That upon completion of the sale and upon registration of the plaintiff as proprietor of the suit property, the plaintiff took exclusive possession of the said property and further fenced off the property. That sometime in January 2010, he was informed by the plaintiff's employees that persons unknown to the plaintiff were marketing the suit property for sale. That around the same time, he received information for the plaintiff's employees that strangers were visiting the suit property ostensibly to inspect the said property.

That out of abundant caution, the plaintiff launched investigations into the strange events that were unfolding and in addition thereto retained the law firm of Gicheru & Company Advocates to protect its legal interest in the suit property.

That the investigations established that the 1st defendant was the party laying claim to the suit property and that the 1st defendant's claim was based on a forged document which she purported to be the document of title in respect of the suit property. The 1st defendant had proceeded to sell the suit property to the 2nd and 3rd defendants. The 1st defendant had fraudulently procured the entry of her name into the computer record maintained by the Municipal Council of Eldoret in respect of the rate payers.

That further investigations revealed that all the records at the Municipal Council of Eldoret except the rates computer printout do not bear any reference to any of the 1st, 2nd or 3rd defendants and that there exists memoranda of registration and transfer signed by the Land Registrar, Uasin Gishu District which show how the suit property was transferred to Harbhajan Singh Sembi and Manjeet Singh Sembi, the vendors who subsequently sold the suit property to the plaintiff. The Municipal Council of Eldoret had over the years been forwarding all the rates demand notes in respect of the suit property to the said H. S. Sembi and M. S. Sembi, who in turn advised the said Municipality that they had sold the land to the plaintiff and that the rates demand notes ought to be sent to the plaintiff.

He has personally visited the District Lands Registry, Uasin Gishu and the record maintained by the Registrar does not bear the 1st defendant's name in the proprietary section of the certificate of title of the suit property. Indeed, the said records have the name of the plaintiff as the registered proprietor of the suit property. That against the foregoing backdrop, the plaintiff filed this suit.

That in the replying affidavit filed on 21st May 2010, the 1st defendant deposed at paragraph 9 thereof that she had transferred the suit property to the 2nd and 3rd defendants and that the said defendants were consequently registered as joint owners of the suit property and were duly issued with a certificate of title.

That the 1st defendant further deposed in an affidavit on record that having transferred ownership of the property to the 2nd and 3rd defendants, she had no further interest in the land and it was her case that she had been wrongly joined in this suit. That in her defence to the amended plaint filed on 27th June, 2013, the 1st defendant averred that she had disposed off her interest in the suit property.

The ***PW1*** further states that by a letter dated 11th October 2010, (annexed to the plaintiff's list of documents and marked as "10" the District Land Registrar, Uasin Gishu wrote to the plaintiff's lawyers concerning the suit property that records held by the said Registry indicated that the plaintiff was the bona fide owner of the suit property and that the parallel title held by the 1st defendant was a forgery and was not an official document. That in a court appearance on 11th December 2012, counsel appearing for the respective parties recorded the consent order annexed hereto and marked as "11" in the plaintiff's list of documents.

That the purpose of the said consent order was to ensure that the plaintiff's and the 2nd and 3rd defendants' rival claim to the suit property was preserved pending the hearing and determination of the suit.

That by a letter dated 20th May 2014, the firm of Nyairo & Company Advocates who are on record for the 2nd and 3rd defendants, wrote to the plaintiff's Advocates advising them that the 2nd and 3rd defendants had decided after a thorough consideration not to contest the plaintiff's claim and in the circumstances sought the plaintiff's concurrence to the bringing of the suit as against the 2nd and 3rd defendants to a close. That by a letter dated 20th November, 2014, addressed to the Deputy Registrar of the High Court of Kenya in Eldoret the plaintiff's Advocates and the Advocates representing the 2nd and 3rd defendants, who were the parties laying rival claims to the suit property and to whose benefit the consent order of 11th December, 2012 was entered into, recorded a consent in the following terms:

(a) That title number Eldoret Municipality Block 13/173 issued to the 2nd and 3rd defendants be and is hereby ordered as cancelled.

(b) The suit between the plaintiff and the 2nd and 3rd defendants is hereby marked as settled.

(c) The plaintiff, the 2nd and 3rd defendants to each bear their own costs.

That the said consent orders materially satisfied the plaintiff in respect of its claim. That he verily believes that the suit herein having been filed for the cancellation of a title document purportedly registered in the name of the 2nd and 3rd defendants, has in consequence of the consent orders of 11th December, 2012 become moot. The claims against the 1st, 4th – 7th defendants were consequential on the claim against the 2nd and 3rd defendants herein and have accordingly been compromised by the consent orders dated 11th December, 2012.

The gravamen of the plaintiff's submission is that the suit property was at all material times governed by governed by the provisions of the Land registration act cap 300 laws of Kenya repealed. Which was an act of parliament enacted to make further and better provisions for the registration of title to land and for the regulation of dealings in land so registered and for the purposes. The plaintiff relies on section 6 (1) (c) of the said act provides that there shall be registry, in which there shall be kept a register, to be known as the land register, in accordance with Division 2 the registry map; parcel files containing the instruments which support subsisting entries in the land register and any filed plans and documents; a book, to be known as the presentation book, in which shall be kept a record of all applications numbered consecutively in the order in which they are presented to the registry; According to Mr Chacha Odera, this provision was satisfied by Dorothy Leting. The plaintiff further refers to section 10 Registered Land Act Cap 300 Laws of Kenya repealed which provides that the land register in respect of each parcel of land in each registration section and a register in respect of each lease to be registered shall be divided into three sections as follows—

A- the property section, containing a brief description of the land or lease, together with particulars of its appurtenances and a reference to the registry map and filed plan, if any; and the proprietorship section, containing the name and, where possible, the address of the proprietor and a note of any inhibition, caution or restriction affecting his right of disposition;

C- the encumbrances section, containing a note of every encumbrance and every right adversely affecting the land or lease.

Counsel submits that the plaintiff is the registered proprietor by dint of section 27 of the Registered Land Act Cap 300 Laws of Kenya (repealed) and cements his submission with the court of appeal decision in Public Trustee and another versus Wanduru (1976-1985) EA 488 at 495, Kneller JA stated that the proprietor of land had title which the register gave him. It is the plaintiff's name that appears in the register and consequently the title the plaintiff holds is genuine as its particulars are in tandem with the particulars in the register.

1ST DEFENDANT'S EVIDENCE AND SUBMISSIONS

DW1 Selina C. Kanda states that she is the 1st defendant herein and well conversant with the issues raised in this matter. She became the registered owner of all that parcel of land known as Eldoret Municipality/Block 13/173 in the year 1989. That she legally purchased the foresaid parcel of land from the rightful original owners namely Simon Kiplagat Rono, Luka Kimutai Chebet and Ernest Kiprotich Kimutai on the 28th day of August, 1989 for value and she paid the agreed consideration of Kshs.550,000/= to the vendors. That she subsequently obtained a Certificate of Lease for the said property on the 25th day of January, 1991 and she took vacant possession of the foresaid parcel in 1991 and enjoyed quiet possession thereafter. That in the year 2009 when she wanted to sell the aforementioned property to the 2nd and the 3rd defendants, she conducted a search on the 10th day of June, 2009 at the Eldoret Lands Registry and indeed the same reflected her name (Selina C. Kanda) as the registered owner. The buyers demanded another search which they carried out on the 15th day of June, 2009 and they were issued with a Certificate of Search which indicated that she was the registered owner of Eldoret Municipality/Block 13/173. That she sold the aforementioned parcel to the 2nd and 3rd defendants. It was duly transferred and they were registered as joint owners of the parcel. That thereafter, she paid all the outstanding land rates and on the 13th day of July, 2009, she was issued with a Land Rates Certificate from Eldoret Municipal Council. That in January, 2010, she was so shocked to be informed by the new owners that the plaintiff herein had chased their security guard from the property by claiming ownership on the property. That she caused a search through her bankers Southern Credit Banking Corporation Limited only to be informed that the green card could not be traced. That she later discovered that the plaintiff carried out a search on the same property on the 14th day of January, 2010. She suspected that there was something fishy going on in the Lands registry and that would be the only explanation to why they refused to fill in a certificate of search requested by themselves. She believes the plaintiff fabricated documents to defraud the 2nd and 3rd defendants of their property over which they had good title. That the 2nd and 3rd defendants stand to suffer great loss and damage if the plaintiff is granted ownership of Eldoret Municipality/Block 13/173 which the plaintiff obtained fraudulently.

The ***gravamen*** of 1st defendant's submissions through Mr Omboto learned counsel is that the title document held by the plaintiff was obtained fraudulently or through misrepresentation. The title document is not a first registration hence not indefeasible. That the first defendant confirmed that the sellers were dead at the time of the sale and that there was no nexus between the plaintiff and the original owners. Moreover, that the evidence of Dorothy Leting is a departure from the statement of defence. That parties are bound by their pleadings and any departure will amount to perjury. That the plaintiff did not produce the consent to transfer the land from the commissioner of lands. That the plaintiff's title is not indefeasible and that the same can be cancelled under the provisions of section 26(10) of the Land registration act that provides as that Certificate of title to be held as conclusive evidence of proprietorship thus that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. Mr Omboto further submits that the 1st defendant has

proved that she acquired the ownership of title procedurally from the relevant authorities.

Lastly, that the plaintiff being a company has not exhibited resolutions of the company that the company acquires the services of an advocate. According to the 2nd defendant, there is no resolution exhibited by the PW1 to confirm that he had the authority from the company to depone to the pleadings in the suit on behalf of the company. Moreover, that no resolution was exhibited to confirm that the company had resolved to file the suit and no resolution to appoint the law firm of Gicheru.

4TH TO 7TH DEFENDANTS EVIDENCE AND SUBMISSIONS

The 7th defendant called *Doroty Chepkogei Leting* the County Land Registrar Uasin Gishu who states that she has been the county land registrar for 3 years in charge of the land registry and that she is in court in respect of the parcel of land known as **ELD/MUN/BLOCK 13/175**. She testified that the register was opened on 17th January 1991 in the name of Simeon Kiplagat, Luka Kimutai Chebet, and Ernest Kiprotich Kimutai which was the first entry. The second entry was a certificate of lease on 17/1/1991. THE 2nd entry was on 25/1/1991 to Herberjan Singh Sembi and MANJIT SINGH sembi. A CERTIFICATE OF LEASE WAS ISSUED ON 25/1/1991. Entry no 5 is a certificate of lease re-issued in the name of Herbajan Sing Sembi and Manjeet Singh Sembi. As the certificate, had been reported lost on 6th October 1997. The certificate of lease was surrendered for purposes of transfer to Seko Ltd. The title was finally cancelled.

The transferors were Herberjan Singh Sembi and MANJIT SINGH Sembi whereas the transferee was Seko Ltd. Stamp duty of 5700 pounds was paid and a registration fees of 375 pounds paid. The rates clearance certificate was received on 6/10/1997 and the transfer of lease was lodged on 31/10/1997. The consent to transfer was received from the land officer on the 11/11/1997 the land was transferred to Seko Ltd and a certificate of lease issued on the same date. On the 21/1/2010 a court order was issued restraining the defendants from dealing with the land in any manner whatsoever. She states that the certificate of lease reading Selina Kanda is not consistent with the green Card in her possession as the names in the certificate of lease do not appear in the register. She states that the documents in possession by the 1st defendant were not issued by the lands office. On cross examination by Mr. Chacha and Mr. Omboto, she maintained that the documents in her possession were the genuine documents and that the documents produced by the 1st defendant were not genuine.

Mr. Wabwire learned litigation counsel in the office of the honourable Attorney General submits that the suit is incompetent as the plaintiff is a limited liability company and that the PW1 being one of the directors of the said company ought to have produced evidence of being a director but he did not. The Attorney General submits that there were no resolutions of the company authorizing the plaintiff to commence the suit, to depone to the pleadings to the pleadings on behalf of the company and to appoint the firm of Gicheru to conduct the matter.

DETERMINATION

The plaintiff and defendant both have documents that indicate that they have an interest in the property. The issue to be determined is who has the proper and genuine documents and therefore is the proprietor of the leasehold interest in Eldoret Municipality Block 13/173. The white card in respect of the suit parcel of land as per documents produced by plaintiff indicates that the register was opened on 17.1.1991. The registration section being Eldoret Municipality Block 13. The land was parceled as number 173 measuring 0.9309 Ha. The lessor was the Government of Kenya and the 1st registered owners were Simeon Kiplagat Rono, Luka Kimutai Chebet and Ernest Kiprotich Kimutai.

According to the extract of the register produced by the plaintiff, which is similar to the extract of register produced by the Land Registrar, on the 17.1.1991, the said Simeon Kiplagat Rono, Luka Kimutai Chebet and Ernest Kiprotich Kimutai were registered as proprietors of the suit property on 17.1.1991 and a certificate of lease issued. On the 25.1.1991, the property was registered in the name of Harbajan Singh Sembi and Manjit Singh Sembi and a certificate of lease issued. On the 6.10.1997, the Certificate of

Lease was re-issued. On the 11.11.1997, the property was registered in the names of Seko Ltd and a Certificate of Lease issued on the same date.

On the 21.1.2010, the High Court issued an order restraining the defendants, respondents, employees, servants or agents from trespassing into selling, leasing or construction upon, wasting or otherwise interfering within the parcel of land pending hearing and determination of the suit on 3.2.2010. The Certificate of Lease issued on 11.11.1997 certifies that Seko Limited were the registered proprietors of the leasehold interest in the property having purchased the property from Harbinder Singh Sembi and Manjit Singh Sembi vide a sale agreement made on 30.9.1997 between the plaintiffs and the Sembis. According to the sale agreement, the Sembis were the vendors whilst the plaintiff was the purchaser.

A letter dated 11.10.2010 by Mr. Tom M. Chepkwesi in respect of the subject matter was produced by the plaintiff which indicates that the plaintiff's documents are genuine whilst the 1st defendant's documents were forged. The plaintiff further produced certificates of official search dated 14.1.2010 and 11.10.2010 indicating that the plaintiff was the registered proprietor of the leasehold for a term of 99 years from 1.2.1990. However, the plaintiff did not explain how the property moved from Simeon Kiplagat Rono, Luka Kimutai Chebet and Ernest Kiprotich Kimitei to the Sembis. The 1st defendant also produced a certificate of lease issued on 25.1.1991 in respect of the same parcel of land. Moreover, the 1st defendant produced a sale agreement made on 28.8.1989 between Simon Kiplagat, Luka Kimutai Chebet and Ernest Kiprotich Kimutai who are alleged to have been the vendors and being in possession of the suit property. The 1st defendant further produced a copy of a green card as evidence that the property was registered in the name of Selina C. Kanda on the 25.01.1991 and a Certificate of Lease issued. The Certificate of Lease and the green card were not certified by the Land Registrar and in fact, the Land Registrar stated on oath that she was a stranger to these documents. The 1st defendant further produced a rent clearance certificate and a certificate of official search.

The Land Registrar, Uasin Gishu produced the original register, gazette notice in respect of loss of title by the Sembis, certificate of lease, transfer of lease, letter of consent and rates clearance certificate. The question this court seeks the answer is, which documents are genuine?

Dorothy Chepkogei Leting, the current County Land Registrar gave evidence that the land in dispute is Eldoret/Municipality/Block 13/173. She produced the original register indicating that Seko Limited were the lawfully registered proprietors of the parcel of land. The County Registrar produced the transfer from Harbajan Singh Sembi and Manjeet Singh Sembi to Seko Limited which was lodged and dated 31.10.1997 and registered on 11.11.1997. The Land Registrar received a consent from the Land Officer on the 11.11.1997. The office of the Land Registrar further received a rate clearance certificate on 6.10.1997. She confirmed that the documents produced by the plaintiff were genuine and same as the documents in her custody.

When shown, the documents produced by the 1st defendant, she stated under oath that the documents were not consistent with the entries in the green card in her custody. The Land Registrar, Uasin Gishu County disowned the green card produced by the plaintiff. She denied ever issuing any document to Selina Kanda or registering any document in favour of Selina Kanda. She denied issuing any certificate in favour of Selina Kanda. The plaintiff submits that the property is registered under the Registered Land Act, Chapter 300 of the laws of Kenya (repealed). The plaintiff refers to section 6(1)(c) of the said Act which provides that there shall be maintained in each registration district a land registry in which shall be parcel files containing the instruments which support subsistence entries in the land register and any filed plans and documents.

After considering the evidence on record and the documents produced in court, I do find that the plaintiff is the registered owner of the property in dispute according to the register produced by the land registrar Uasin Gishu. ***Section 6 (1) of the Registered land Act cap 300 laws of Kenya (repealed)*** provides that there shall be maintained in each registration district a land registry, in which there shall be kept - (a) a register, to be known as the land register, in accordance with Division 2;(b) the registry map; (c) parcel files containing the instruments which support subsisting entries in the land register and any filed plans

and documents;(d) a book, to be known as the presentation book, in which shall be kept a record of all applications numbered consecutively in the order in which they are presented to the registry;(e) at the discretion of the Chief Land Registrar an index, in alphabetical order, of the names of the proprietors. This section is similar to Section 7 of the Land Registration Act 2012. The import of this sections is that the register as kept by the registrar shall be the final record in respect to proprietorship of land in the registration area.

Section 27 of the Registered Land Act (repealed) provides the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

Section 28 of the said repealed law provides that the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register: Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

The same was repealed by the **Land Registration Act, 2012. Section 24 provides** for interest conferred upon registration thus Subject to the Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. **Section 25** provides for the rights of a proprietor thus: -

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register......

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. **Section 26 provides** for Certificate of title to be held as conclusive evidence of proprietorship thus: -

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

The 4th to 7th defendant's pleadings are that the land belonged to the 1st defendant, however, the evidence on record as produced by the County Land Registrar was to the effect that the land belonged to the plaintiff. The Attorney General filed a defense denying the claim by the plaintiff which was never amended and stating that the 1st defendant was the lawful owner of the land in a dispute however, the evidence of DW2, Dorothy Leting was contrary to the pleadings. The evidence by Dorothy Leting was that the plaintiff was the legal owner of the suit land and that the documents obtained by the 1st defendant were not legally obtained and that were fraudulently obtained. The fact that the Attorney General disputed the documents in possession of the 1st defendant indicates that the plaintiff had no cause of action against the Attorney General.

On the issue, as to whether the suit is incompetent, the defendant has argued that no evidence was tendered to the effect that PW1 was a director of the plaintiff. Moreover, the evidence was tended to show that the plaintiff's wife was a director. Lastly, that there was no resolution that the suit be filed and that the company acquires the services of an advocate. According to the 2nd defendant, there is no resolution exhibited by the PW1 to confirm that he had the authority from the company to depone to the pleadings in the suit on behalf of the company. Moreover, that no resolution was exhibited to confirm that the company had resolved to file the suit and no resolution to appoint the law firm of Gicheru.

Mr. Chacha Odera learned counsel for the plaintiff argued that the issue as to whether the suit was filed without a resolution was never pleaded and only came up during cross examination and therefore, the issue of competence of suit was never raised. Moreover, the plaintiff argues that the Civil Procedure Rules, 2010 came into effect on 10.12.2010 whilst the suit was filed on 20.1.2010. The relevant rule is Order 4, Rule 1(4) of the Civil Procedure Rules and that the defendants have already submitted to the jurisdiction of the court and that the issue should have been raised at the earliest opportunity.

I do agree with Mr. Chacha Odera that the defendants have raised the issue of the competency of the suit in cross examination and submission and do intend to defeat the plaintiff's suit on a technicality. I am convinced that this is one of the scenarios contemplated by Article 159 of the Constitution which calls upon the court to deal with substantive justice but not to put undue regard on technicalities. There is no dispute between the director of the company whether to file the suit or not. The dispute is whether the land in issue belongs to the plaintiff or the defendant. Dismissing the suit on the basis of lack of resolution of the board of directors would be an affront to Article 159 of the Constitution.

Though there is no evidence that the documents held by the 1st defendants were fraudulently obtained, the same have been disowned by the Land Registrar, Uasin Gishu as not originating from the custody of the land registrar. This court finds that there is no basis for holding that the said documents are genuine and therefore, finds that the plaintiff has proved on a balance of probabilities that he is the lawful owner of all that parcel of land known as Eldoret/Municipality Block 13/173. I do find that all documents held by the

1st, 2nd, 3rd defendants are not recognized by law and the same are declared nullities. I do direct that each party to bear own costs due to the fact that the 5th, 6th and 7th defendants initially filed defence in support of the 1st defendant only to produce evidence to the County.

I do take this opportunity to thank learned counsel for plaintiff, **Mr. Chacha Odera**, and Mr. Aseso, learned counsel for 1st defendant, **Mr. Omboto** and **Mr. Komen** and the Honourable Attorney General through **Mr. Wabwire** for the industrious research in this matter.

DATED AND DELIVERED AT ELDORET THIS 14TH DAY OF JULY, 2017.

A. OMBWAYO

JUDGE